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No.

IN THE

Supreme Court of the United States

October Term, 1985

DISTRICT 2, UNITED MINE WORKERS OF AMERICA, GEORGE ZAYAC and JANET ZAYAC,
Petitioners

vs.

THE HELEN MINING COMPANY,
Respondent

and

HARRISON COMBS, JOHN J. O'CONNELL and PAUL R. DEAN, as Trustees of the UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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vs.

THE HELEN MINING COMPANY,

*Respondent**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

QUESTIONS PRESENTED

1. Whether the federal courts are precluded by *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982) from reviewing a dispute resolution decision of the trustees of an employee benefit plan under a standard of reasonableness.

2. Whether the Trustees' denial of Petitioner Zayacs' claim for medical benefits was arbitrary and capricious.

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*Harrison Combs, John J. O'Connell and Paul R. Dean, as Trustees of the United Mine Workers of America Health and Retirement Funds were parties to the action in the United States District Court for the Western District of Pennsylvania (Pittsburgh) (D.C. Civil No. 84-87). The District Court dismissed petitioners' claims against the Trustees on the ground of judicial-type immunity. That issue was not appealed to the United States Court of Appeals for the Third Circuit and the Circuit Court expressed no opinion on the District Court's holding. The Trustees are not a party in this petition for writ of certiorari.

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District 2, United Mine Workers of America ("Union"), George Zayac and Janet Zayac respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 31, 1985, rehearing denied July 5, 1985, in which the Court reversed the District Court's order denying respondent's motion for summary judgment and granting petitioners' motion for summary judgment against respondent.

OPINIONS BELOW

The opinion of the District Court for the Western District of Pennsylvania, entered October 9, 1984 is unreported (Appendix B, infra, pp. 14a-31a). The opinion of the United States Court of Appeals for the Third Circuit is reported at 762 F.2d 1155, and was filed on May 31, 1985 (Appendix A, infra, pp. 1a-13a).

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1985 (Appendix C, infra, pp. 32a-33a). A petition for rehearing, permitted by the court on June 26, 1985 to be filed out of time, was denied on July 5, 1985 (Appendix D, infra, p. 34a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 301 and 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. §§185(a) and 186 (c)(5) and Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132. They are reprinted in Appendices "F" through "I", infra, pp. 36a-47a.

STATEMENT OF THE CASE

I. Procedural History

Respondent, Janet Zayac, wife of George Zayac, was required to undergo gastro-intestinal surgery to correct morbid obesity. Mr. Zayac's employer, Respondent Helen Mining Company ("Helen") refused payment of the attendant hospital and physician bills under its employee benefit plan on the grounds that prior approval of the procedure had not been obtained from the company. Helen's decision was upheld by the Trustees of the United Mine Workers of America Health & Retirement Funds ("Trustees") who are charged with resolving disputes under the employee benefit plan.

On January 16, 1984, petitioners filed this action under Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185 ("LMRA"), and Section 502 of the Employee Retirement Income Security Act, 29 U.S.C. §1132 ("ERISA"). The complaint sought to vacate the Trustees' opinion as arbitrary and capricious and to require Helen to pay medical expenses in an amount of $17,612.30.

On October 9, 1984, the District Court issued a Memorandum Opinion and Judgment Order. The Order granted the Trustees' Motion to Dismiss, denied Helen's Motion for Summary Judgment and granted Plaintiffs' Motion for Summary Judgment against Helen. Judgment was entered in favor of the Zayacs and against Helen for $17,612.30.

Helen thereafter appealed to the United States Court of Appeals for the Third Circuit. No appeal was taken from the District Court's Judgment Order dismissing the complaint against the Trustees.

The Circuit Court reversed the Order of the District Court granting summary judgment for petitioners and directed that the District Court grant respondent's motion for summary judgment. Petitioner thereafter filed a motion for leave to file a petition for rehearing out of time. This was granted by the Circuit Court on June 26, 1985, but the motion for rehearing was denied on July 5, 1985. This petition for writ of certiorari followed.

II. Factual Background

Respondent George Zayac is employed by Helen as a coal miner at a mine in Indiana County, Pennsylvania. Mr. Zayac is represented in collective bargaining by the United Mine Workers of America ("UMWA"). Helen and the UMWA are parties to the National Bituminous Coal Wage Agreement of 1981 ("Agreement"), a multi-employer, collective bargaining agreement which establishes the wages, hours, and conditions of employment of Zayac and his fellow employees.

Pursuant to Article XX, Section (c)(3)(i) of the Agreement, Helen through its parent, the North American Coal Corporation, established a benefit plan providing health care benefits for its employees and their eligible dependents, including spouses. Included within the coverage of the plan are charges for treatment of morbid forms of severe obesity (200% or more of desirable weight) when other, more conservative therapies have been tried and proven unsuccessful and prior approval has been obtained from the Plan Administrator.

According to a circulated opinion of the Trustees of the UMWA Health & Retirement Plan, who have supervisory authority over employee benefit plans established under the 1981 Agreement, the purpose of the "prior authorization" requirement is to insure that benefits are

paid only for surgery that is medically necessary. The opinion further states that it is the practice of the UMWA Health & Retirement Funds to permit prior approval prior to payment of benefits, or prior to the performance of surgery if the surgery is determined to be medically necessary. Helen's benefit plan does not specify what steps an employee should follow to obtain prior authorization for obesity surgery.

In July, 1982, Janet Zayac underwent gastrointestinal surgery for the treatment of morbid obesity. At the time of her surgery, Mrs. Zayac was 200% of her desirable weight, and other conservative, therapeutic methods for the treatment of obesity had been unsuccessfully tried. It is undisputed that the surgery was medically necessary.

Following discharge, claims for medical benefits were submitted to the Plan Administrator for payment, but were rejected solely due to a lack of prior approval. Neither the Zayacs, nor their physician, Dr. El-Hillal, were aware of the plan's requirement of prior authorization for obesity surgery, and did not attempt to obtain such authorization prior to surgery. The record is devoid of any evidence of efforts by the employer to warn or inform employees of the need to obtain prior approval for certain surgeries, other than the distribution of the summary plan description.

Helen's refusal to pay the Zayac medical bills was initially considered in a meeting between the company and the officers of UMWA, District 2. At a meeting held October 25, 1983, Paul Gormish, President of District 2 asked Paul Piccolini, the Manager of Health Services for North American Coal Corp., whether prior approval of these charges would have been granted, if it had been requested. Mr. Piccolini answered "yes".

Also present at the meeting was Harry Hegepeth, President of Florence Mining Company, a subsidiary of North American with supervisory responsibility for Helen. Mr. Hegepeth stated that payment of Janet Zayac's medical expenses would cause the cost of coal to increase and Pennsylvania Electric, the owner of the mine, would frown upon this. Hegepeth further indicated that Helen Mining was not in good financial condition and payment of the medical expenses would raise the cost of coal and could force Helen to lay off some employees.

Pursuant to Article XX, Section (e)(6) of the Agreement, on September 14, 1982, District 2 requested an advisory opinion from the Trustees of the benefit plan. On November 1, 1983, the Trustees issued a decision. They stated that because prior approval of the Plan Administrator had not been obtained, the employer was not responsible for payment of charges incurred by the employee. The Trustees stated that the employee's spouse met the first two requirements for benefits to be provided for surgical treatment of obesity; namely, that the diagnosis signified a pathological, morbid form of severe obesity and that more conservative therapies had been tried and proven unsuccessful.

The District Court reversed the decision of the Trustees because it found the decision arbitrary and capricious on the ground that there was no rational nexus between the decision and the prior approval requirement. The Trustees had previously published an opinion which ruled that the purpose of the prior approval requirement was to insure that benefits are paid only for medically necessary surgery. In this case, the Trustees found the Zayac surgery to be medically necessary. Thus, the purpose if not the letter of the requirement was

met.[1] The Court held the decision of the Trustees elevated form over substance, frustrated the very purpose of the substance and was therefore arbitrary and capricious.

The Circuit Court reversed. It reasoned that while *Robinson* dealt with a district court's review of a collectively bargained eligibility requirement, the decision is equally applicable to judicial review of a trustee's decision in *administering* collectively bargained plan provisions. Alternatively, the panel's decision characterized the District Court's decision as a *sub silentio* review of the reasonableness of the prior approval requirement.

REASONS FOR GRANTING THE WRIT

A. The Federal Court of Appeals for the Third Circuit has decided an important question of federal law which this Court should settle, relative to the appropriate standard of review of a Trustee's decision in administrating a benefit plan's provision.

In *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), this Court held that where an eligibility requirement was derived from explicit, informed and intense collective bargaining, it should not be disturbed or set aside by a court in the absence of a finding that the eligibility requirement violated federal law or policy. Such eligibility requirements are not subject to review under a reasonableness standard. The present case involves the undecided question of whether federal courts are precluded by *Robinson* from reviewing a

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1. Indeed, company officials admitted that had approval of the surgery been requested, it would have been granted.

trustee's decision in administering a benefit plan's provisions under a standard of reasonableness.

In deciding this issue the Court of Appeals for the Third Circuit relied on *Robinson* and concluded that "when the trustees have consistently and literally followed an unambiguous benefit eligibility requirement that was bargained for and that was set forth in an employee benefit plan, that action cannot be called arbitrary and capricious by a court unless enforcement would violate federal law or policy." (Ap. A, infra., p. 11a).

The Circuit Court's determination that this issue is governed by *Robinson* is incorrect. It is incorrect in that: 1. *Robinson* does not apply where a party does not seek to invalidate an eligibility rule. 2. *Robinson* only applies to situations involving eligibility requirements which were collectively bargained for and does not apply to discretionary rules originated by trustees or trustee eligibility decisions. 3. Regardless of whether *Robinson* precludes a federal court from reviewing a collectively bargained eligibility requirement under a reasonableness standard, *Robinson* does not preclude a federal court from reviewing the decisions and actions of trustees in administering those provisions and 4. The Circuit Court's decision removes the only protection that claimants have against an arbitrary and capricious determination by trustees of their claims.

1. In *Robinson*, the Supreme Court reversed a decision of the Court of Appeals for the District of Columbia Circuit which had ruled a provision of the UMWA 1950 Benefit trust, as incorporated in the 1974 Wage Agreement, invalid on the basis that it was unreasonable to discriminate between two classes of widows of miners with respect to the extension of health benefits. The Supreme Court ruled that Section 302(c)(5) LMRA does

not require pension plan eligibility requirements to meet an undefined standard of reasonableness. It further ruled that federal courts lacked authority to modify the substantive terms of collectively bargained contracts absent a violation of federal law or policy.

The eligibility requirement upheld in *Robinson*, extended lifetime health care benefits to unmarried widows and dependents of miners, who died prior to 1974, and who at the time of their death were receiving pensions under the 1950 Fund. The provision denied such coverage to similarly situated widows of miners, who though eligible for pensions, were still working at the time of their death. While the Supreme Court acknowledged a line of cases which reviewed eligibility requirements under a test of reasonableness, it distinguished these cases on the grounds that the Trustees established those eligibility requirements under a discretionary grant of authority. In *Robinson* the eligibility rule in question had been established in collective bargaining and was therefore immune from a reasonableness review.

Unlike *Robinson* this suit does not seek to invalidate an eligibility rule. The Zayacs do not challenge the appropriateness of the prior authorization rule. Rather, they challenge only the Trustees' decision in applying it to the facts of this case. While the Circuit Court states that this is a *sub silentio* attack on the rule itself, such is not the case. The effect of granting the Zayacs' motion for summary judgment is not to invalidate or excise the prior authorization rule, but only to hold that its application is unjust under the facts of this case wherein all parties agreed that the surgery was a medical necessity, that neither the Zayacs nor their physician were aware of the prior authorization requirement, and where the com-

pany agreed that had permission been requested, it would have been granted. Respondents have not sought to have the prior approval rule excised or reviewed under a reasonableness standard. On the facts, therefore, *Robinson* is simply inapplicable.

2. Unlike *Robinson* the prior authorization rule involved here is grounded in a discretionary determination of the Trustees and not in a collectively bargained provision. In support of its motion for summary judgment and in particular to establish that the prior authorization rule was collectively bargained, Helen submitted the affidavit of Roger M. Haynes. Mr. Haynes testified that the BCOA and UMWA first established individual employer benefit plans for employees in 1978. He further stated:

> 6. That, in establishing the employee benefit plans to be maintained and implemented by the signatory operators, BCOA and UMWA negotiators reviewed *all of the interpretations that had previously been established and utilized by the Trustees* and, in the course of explicit, informed and intense bargaining, *adopted, revised,* or *rejected* those interpretations. What was finally agreed upon was then inserted into the United Mine Workers of America 1950 Benefit Plan and Trust, the 1974 Benefit Plan and Trust and the employee benefit plans to be maintained and implemented by the signatory operators.
>
> 7. That I am familiar with the eligibility requirement in the benefit plan of signatory operators providing for "prior approval" for certain types of surgery, including surgery for morbid obesity, and can testify from personal knowledge that "prior approval" eligibility requirement was among those that were discussed and *adopted* during and as a result of

> collective bargaining between the UMWA and BCOA during negotiation of the 1978 Wage Agreement.
>
> (Emphasis Supplied)

Inasmuch as the "prior approval" rule was *"adopted"* by the bargainers in contradistinction to being "revised" or "rejected", it is a direct appropriation of earlier "interpretations that had previously been established and utilized by the Trustees." As the initiator of the language, the Trustees were best suited to authoritatively interpret it and did so in Request for Decision No. 138 wherein they stated:

> The purpose of the "prior authorization" requirement is to insure that benefits were paid only for surgery that is medically necessary. It is the practice of the Funds *to permit approval prior to payment of benefits or prior to performance of surgery* if the surgery is determined to be medically necessary.
>
> (Emphasis Supplied)

The prior authorization rule has its roots not in the give and take of collective bargaining but in the discretionary rule of the Trustees which subsequently was adopted by negotiators. Having adopted the Trustees' rule, the negotiators must be said to have adopted the Trustees' rationale that it is designed to assure medical certainty, and that once medical certainty is assured, authorization may be obtained prior to surgery or prior to the payment of benefits. The district court applied just that interpretation and arrived at the only possible just result. Indeed, to interpret the prior authorization requirement other than in accordance with the Trustees' interpretation subverts the collectively bargained adoption of that interpretation and would itself violate the spirit of *Robinson.*

3. Although eligibility requirements established in collective bargaining are not subject to a review for reasonableness under *Robinson*, the decisions of this Court do not preclude a lower court's review of a trustee's application and interpretation of those requirements under a reasonableness standard.

There is a clear distinction between reviewing the reasonableness of a plan's eligibility requirement and reviewing a trustee's administration or application of that requirement.

In *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454 (6th Cir. 1984), the plaintiff, as in *Robinson*, brought suit to force review of a plan provision, and to have it declared arbitrary and capricious. *Id* at 455. *Moore* did not involve an attempt to review a trustee's application of a plan requirement. However, the *Moore* Court was cognizant of this distinction when it stated:

> . . .*Seller* is distinguishable from the case at bar because it focused on the Trustee's *application* of the fund's provisions. *Clearly, a court may review the administration of a pension fund to determine whether the provisions are applied in an arbitrary or capricious manner.* However, review of a plan's provisions for reasonableness is improper.
>
> *Id* at 456, n4 (Emphasis Added)

Thus, the Court clearly noted that courts may review a trustee's action in administering or interpreting a plan's provisions. They reiterated this proposition when they stated:

> In contrast, once a plan is established and is governed by the requirements of ERISA, courts may review a decision by trustees to deny benefits. *Rhoton v. Central States, Southeast and Southwest*

> *Areas Pension Fund*, 717 F.2d 988 (6th Cir. 1983); *Van Gunten v. Central States, Southeast and Southwest Areas Pension Fund*, 672 F.2d 586 (6th Cir. 1982). Such review, however, is limited to a determination of whether the trustees' actions in administering or interpreting a plan's provisions are arbitrary and capricious. Courts may review the trustees' administration of a pension plan because Congress has imposed a fiduciary duty upon trustees to administer such plans for the sole and exclusive benefit of the beneficiaries . . .
>
> *Id* at 457.

Following the logic of *Robinson*, an employer or an employer and a collective bargaining agent are free to choose which benefits to include in a retirement program so long as the stringent requirements of ERISA are met and no other law or policy is violated. However, this does not preclude a judicial review of a trustee's administration of those requirements. A trustee's action in applying and interpreting the plan is not precluded from review under the arbitrary and capricious standard, and this is so regardless of whether the plan requirements were collectively bargained for or regardless of whether the trustees had the power to determine or establish plan requirements.

4. The decision of this Court in *Robinson* requires a federal court to defer to judgments and tradeoffs made in the course of free collective bargaining-the keystone of our national labor relations policy. The Court of Appeals' decision affords the same deference to administrative decisions of trustees applying conflicting views of fact to the terms of a plan. The Circuit Court's decision removes the only protection that millions of participants have from the arbitrary and capricious determination of their

claims. Who will now protect the claimant from the arbitrary and capricious interpretation of a plan requirement?

In the case at bar, the Zayacs sought the intervention of that institution in American society specifically designated to provide a "just" determination of disputes. (Rule 1, Federal Rules of Civil Procedure). They sought equity. All developed systems of law which serve the needs of a modern civilized state recognize that the strict application of rules of law is not adequate to meet the demands of justice in certain cases. Federal district courts, as courts with equitable powers, have the right and the duty to meet the moral standards of justice in a particular case by mitigating the rigidity of the applications of strict rules of law so as to achieve a just result in the circumstance of the particular case. McClintock, *Principles of Equity* (2nd Ed. 1948). It is one thing to rigidly apply eligibility requirements developed in collective bargaining. It is quite another to rule that arbitrary and capricious, i.e., nonrational and unjust administrative applications of collectively adopted rules are not subject to federal court review. Rather than fostering collective bargaining and private dispute settlement, the Circuit Court's decision may well compel labor and management alike to withdraw from collective bargaining and eliminate administrative determinations of disputes under employee benefit plans.

The effect of the Circuit Court's decision is to withhold plan benefits, to reduce benefit costs to keep the price of coal low, and to benefit the self-insured employer. Public policy requires that pension and benefit plans be construed, where possible, to avoid the forfeiture of rights which an employee through years of service has earned. *Hoefel v. Atlas Tack Co.*, 581 F.2d 1, 6 (1st

Cir. 1978) *cert. denied*, 440 U.S. 913 (1979). The circuit court opinion runs squarely contrary to this policy. Benefit plans will now be administered for the benefit of the employer.

The Circuit Court's decision gives an overly broad reading to this Court's decision in *Robinson* and ignores the appropriate distinction between invalidating a collectively bargained eligibility requirement and reviewing an administrative decision under an arbitrary and capricious standard. Most significantly the opinion strips from literally thousands of administrative decisions the protection of limited review by the federal courts. The Circuit Court has simply misapplied *Robinson* to this case. The appropriate standard of review of a trustee's actions in administering a benefit plan is the arbitrary and capricious standard. Under the facts of this case the Trustees acted arbitrarily and capriciously in denying payment of the Zayacs' medical expenses.

B. The decision of the Third Circuit Court of Appeals is in direct conflict with decisions of other Federal Courts of Appeal.

The failure of the Court below to review the decision of the Trustees under an arbitrary and capricious standard is contrary to the holding of other circuits which continue to review trustee originated eligibility requirements and trustee eligibility decisions for reasonableness post *Robinson*. *Murn v. UMW 1950 Pension Trust*, 718 F.2d 359, 361 (10th Cir. 1983); *Hurn v. Retirement Fund Trust of the Plumbing, Heating & Piping Industry of Southern California*, 703 F.2d 386, 389 (9th Cir. 1983); *Seller v. O'Connell*, 701 F.2d 575, 577 (6th Cir. 1983); *Moore, supra.*

While the Court held in *Robinson* that a federal court was not authorized to review the provisions of collective bargaining agreements for reasonableness, it did not hold that a federal court was precluded from reviewing the enforcement of those provisions in particular cases for arbitrary and capricious results. Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run. *Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413, 417 (9th Cir. 1983). Judicial intervention is appropriate where the trustees' actions in fashioning or applying eligibility requirements do not have a reasonable basis or are arbitrary and capricious. *Id* at 418. The proper standard of review in this case is the arbitrary and capricious standard.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

DISTRICT 2, UNITED MINE WORKERS OF AMERICA, George Zayac and Janet Zayac

v.

The HELEN MINING COMPANY, Appellant,

and

Harrison Combs, John J. O'Connell and Paul R. Dean, as Trustees of the United Mine Workers of America Health and Retirement Funds.

No. 84-3723.

United States Court of Appeals, Third Circuit.

Argued May 17, 1985
Decided May 31, 1985.

An action was filed alleging that the trustees of an employee benefit plan acted arbitrarily and capriciously in denying benefits to the spouse of an employee. The United States District Court for the Western District of Pennsylvania, Alan N. Bloch, J., held that the denial of benefits was arbitrary and capricious. Appeal was taken. The Court of Appeals, Sloviter, Circuit Judge, held that, when the trustees of a benefit plan have consistently and literally followed an unambiguous benefit eligibility requirement that was bargained for and that was set forth in the employee benefit plan, the action could not be called arbitrary and capricious by a court unless enforcement would violate federal law or policy and, therefore, the District Court erred in determining that the trustees' application of the plan's requirement that there be prior approval for surgical treatment of morbid obesity was arbitrary and capricious.

Reversed.

1. Labor Relations — 131.7

When trustees of employee benefit plan have consistently and literally followed unambiguous benefit eligibility requirement that was bargained for and that was set forth in plan, that action cannot be called arbitrary and capricious by court unless enforcement would violate federal law or policy. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132.

2. Labor Relations — 131.7

Where employee benefit plan specifically provided that prior approval was required before benefits could be obtained for surgical treatment of morbid forms of severe obesity and trustees' application was consistent with their proper interpretation of provision, trustees' refusal to pay benefits on ground that prior medical approval had not been obtained was not arbitrary or capricious. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132.

Anthony J. Polito, Ronald S. Cusano (Argued), Corcoran, Hardesty, Ewart, Whyte & Polito, P.C., Pittsburgh, Pa., for appellant.

Melvin P. Stein, Paul R. Yagelski (Argued), Kuhn, Engle & Stein, Pittsburgh, Pa., for appellees.

Before HUNTER and SLOVITER, Circuit Judges, and MUIR, District Judge*

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* Hon. Malcolm Muir, United States District Court for the Middle District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Before us is the appeal by an employer who claims that the district court erred in holding that the action of the trustees of an ERISA-covered employee benefit plan in denying benefits to the spouse of an employee was arbitrary and capricious. We hold that the district court erred as a matter of law.

I.

Facts and Procedural History

Janet Zayac is the wife of George Zayac, a coal miner employed by the Helen Mining Company (employer) at a mine in Indiana County, Pennsylvania. In July, 1982, she underwent in-hospital surgical treatment for severe obesity, which consisted of a gastric bypass, gastrojejunostomy, jejunojejunostomy and Roux-en-Y procedure. Her physician had determined that surgery was medically necessary because she was 200% of her desirable weight and other more conservative methods of treatment had been tried and were unsuccessful. She was discharged from the hospital two weeks later.

Mr. Zayac submitted to the employer's plan administrator a claim for benefits in the amount of $17,612.30 for his wife's surgery. Benefits were denied because prior approval for the surgery had not been obtained from the benefits plan administrator, as required by the plan. It is undisputed that neither the Zayacs nor their physician had sought or obtained prior approval. There is also no dispute that the lack of such approval was the sole reason the claim was denied.

The collective bargaining agent, District 2 of the United Mine Workers of America (UMWA), filed a re-

quest for Resolution of Dispute on behalf of the Zayacs with the trustees of the benefit plan. The trustees upheld denial of benefits, and the Zayacs and the union brought this action under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and Section 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132, seeking to overturn the trustees' decision.

After discovery, the parties agreed that the issues could be resolved by summary judgment, and filed cross-motions. The district court then awarded judgment to the Zayacs and against the employer in the amount of $17,612.30, holding that the trustees' application of the prior approval requirement in the present case was arbitrary and capricious. The employer, Helen Mining Company, has appealed.[1]

II.

The Relevant Plan Provisions

The employer and the UMWA are signatories to the National Bituminous Coal Wage Agreement of 1981 (1981 Wage Agreement), a multi-employer collective bargaining agreement, the successor to a 1978 Wage Agreement. According to an unrebutted affidavit of a member of the Benefits Committee for the Bituminous Coal Operators' Association (BCOA), the 1978 Wage Agreement provided for the first time for the establishment and maintenance of employee benefit plans by the signatory operators rather than the trustees to provide health and other non-pension benefits to their employees. The affi-

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1. The district court also dismissed the plaintiffs' claims against the trustees on the ground of judicial-type immunity. That issue has not been raised on appeal and hence we express no opinion on that holding.

davit also avers that "in establishing the employee benefit plans to be maintained and implemented by the signatory operators, BCOA and UMWA negotiators reviewed all of the interpretations that had previously been established and utilized by the Trustees and in the course of explicit, informed and intense bargaining, adopted, revised or rejected those interpretations". What was finally agreed upon in negotiations was then inserted into the employee benefit plans to be maintained and implemented by the signatory operators.

Pursuant to the provisions of the applicable collective bargaining agreement, the employer maintained a benefit plan to provide health care benefits for employees and eligible dependents, including spouses. One of the health care benefits included within the plan was coverage of certain surgical treatments for morbid forms of severe obesity (two or more times desirable body weight). The plan sets out two pre-requisites to obtaining benefits:

> 1. The beneficiary has a pathological, morbid form of severe obesity (200% or more of desirable weight);
>
> 2. *Prior approval has been obtained from the Plan Administrator.*

(emphasis added). The affidavit referred to above specifically states that the prior approval eligibility requirement was discussed and adopted as part of the benefit plan as a result of collective bargaining between the BCOA and UMWA during negotiation of the 1978 Wage Agreement. That eligibility requirement has been carried forward in employee benefit plans of signatory operators since 1978.

The trustees are given authority to make alterations in the benefit plan provisons, as they may deem to be

necessary or appropriate, only "upon prior written approval by the Employees and the Union." They are also authorized and directed, after adequate notice and consultation with the employers and union, to make changes in the plans if necessary to conform the terms of the plan to the requirements of ERISA, or any other applicable federal law, and the regulations issued thereunder and to comply with all applicable court or government decisions or rulings.

In rejecting Mrs. Zayac's appeal of the plan administrator's denial of her claim for benefits, the trustees stated:

> Question and Answer 81-20, attached hereto, lists three conditions that must be satisfied for benefits to be provided for surgical treatment of obestity: (1) the diagnosis signifies a pathological, morbid form of severe obesity, (2) other, more conservative therapies have been tried and proved unsuccessful, and (3) prior approval has been obtained from the Plan Administrator.
>
> Although the employee's spouse meets the first two requirements, she did not obtain prior approval from the Plan Administrator. Because prior approval of the Plan Administrator had not been obtained, as required, the Employer is not responsible for payment of charges incurred by the employee.

The trustees had issued two "Question and Answer" interpretations on coverage for obesity treatment before Mrs. Zayac's surgery. In 1979, they issued Contract question and Answer No. 38, as follows:

> Subject: Obesity
>
> Question:
>
> 1. a) Under Article III, Section A(3)(h) the benefits are limited to services "for treatment of illnesses

or injuries, if provided by a physician". In this context, is the treatment of obesity, where no other pathology exists (e.g., hypertension, cardiovascular disease, diabetes), a covered benefit?

b) Under what conditions are benefits provided for the surgical treatment of obesity?

Answer:

1. a) Yes, if the diagnosis signifies pathological, morbid form of servere obesity, i.e., 200% or more of the desirable weight. Beneficiaries eligible for obesity benefits at the onset of treatment are eligible for such benefits until they reach their desirable weight.

b) Benefits are not provided for surgical treatment of obesity unless all of the following conditions are met:

1) The beneficiary's condition meets the above definition of obesity;

2) other, more conservative therapies have been tried and proven unsuccessful; and

3) authorization has been obtained from the Plan Administrator.

In 1981, the trustees issued Question and Answer No. 81-20, which provided as follows:

Subject: Surgical Treatment of Obesity

References: Amended 1950 & 1974 Benefit Plans & Trusts, Article III, Section A(3)(f) and A(11)(a)25[2]

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2. Both the 1950 and 1974 Benefit Plans and Trusts, as amended by the collective bargaining parties in 1978, were incorporated by reference into and made part of the 1981 Wage Agreement.

Question:

What conditions must be satisfied for the Plan Administrator to approve gastric or intestinal by-pass surgery for the treatment of obesity?

Answer:

Benefits are only provided for these two surgical procedures when all of the following conditions are satisfied:

1. The Beneficiary has a pathological, morbid form of severe obesity (two or more times the desirable weight);

2. other, more conservative therapies have been tried and proved unsuccessful; and

3. prior approval has been obtained from the Plan Administrator.

III.

Decision of the District Court

In granting summary judgment for the plaintiffs, the district court stated that its review of the trustees' actions is limited to whether they were arbitrary and capricious. The court construed this as requiring "that it must consider whether there is a rational nexus between the purpose behind the prior approval requirement and the decision." The court noted that the trustees in an earlier decision had stated that the purpose of the prior authorization requirement is to insure that benefits are paid only for surgery that is medically necessary. Since, in this case, the trustees acknowledged that Mrs. Zayac's surgery was medically necessary, the court determined that the decision by the trustees denying Mrs. Zayac's claim "frustrates the purpose of the prior approval rule." It found no rational justification for the trustees' action and found the trustees' decision to be arbitrary and capri-

cious. It stated that "a claimant must still establish medical necessity in order to recover without gaining prior approval," and that "[t]he essence of this decision is that the trustees should not promote form over substance, especially when the form frustrates the purpose of the substance."

IV.

Discussion

The employer contends that the district court erred in reviewing the trustees' decision to deny benefits under the arbitrary and capricious standard. It contends that under *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), the only inquiry a district court may make as to the trustees' application of an eligibility requirement in a plan was derived as a result of explicit, informed and intense collective bargaining is whether it violated federal law or policy. We need not decide whether a more limited review standard than arbitrary and capricious would be appropriate since we conclude that even under that standard the trustees' decision in this case must be upheld. We believe that result is compelled by the reasoning of the Supreme Court decision in *Robinson*.

In *Robinson*, widows of coal minors sued to set aside a collectively bargained benefits eligibility provision that gave increased health benefits to widows of pensioners but not to widows of pension-eligible miners. The plaintiffs contended that the provision was arbitrary and bore no rational relationship to the purpose of the trust fund. The Court of Appeals held the discrimination was arbitrary and failed to satisfy the requirement of § 302(c)(5) of the Labor Management Relations Act, 29

U.S.C. § 186(c)(5), requiring that employee benefit trus
funds be maintained for the sole and exclusive benefits o
the employees and their dependents, because the trust
ees were unable to produce an acceptable explanation fo
the discrimination between pensioners. The Court of Ap
peals, although recognizing the legitimacy of concer
about actuarial soundness, stated that it must be secure
"on lines reasonably calculated to further the fund's pur
poses." *Robinson v. United Mine Workers of America
Health and Retirement Funds*, 640 F.2d 416, 423-2
(D.C.Cir.1981).

The Supreme Court reversed. It held that § 302(c)(5
does not impose a "general requirement that the com
plex schedule of the various employees benefits mus
withstand judicial review under an undefined standard o
reasonableness." 455 U.S. at 574, 102 S.Ct. at 1233. Th
Court emphasized the limited role of the federal court
in such cases. It said:

> As long as [eligibility] conditions do not violate fed
> eral law or policy, they are entitled to the sam
> respect as any other provision in a collective
> bargaining agreement.

Id. at 575, 102 S.Ct. at 1234. It continued,

> [W]hen neither the collective-bargaining process no
> its end product violates any command of Congress,
> federal court has no authority to modify the substan
> tive terms of a collective-bargaining contract.

Id. at 576, 102 S.Ct. at 1234.

Although the challenge in *Robinson* was to a benef
provision itself rather than to its application by trustee
it is clear that the Court's analysis is apposite to judicia
review of action by trustees in administering provision
of the plan established pursuant to a collective

bargaining agreement. The Court stated, "Absent conflict with federal law, then, the trustees breached no fiduciary duties in administering the 1950 Benefit Trust in accordance with the terms established in the 1974 collective-bargaining agreement." 455 U.S. at 574, 102 S.Ct. at 1233.

[1] Therefore, we reject appellees' attempt to distinguish *Robinson* from this case on the argument that *Robinson* only precludes review of collectively bargained eligibility requirements themselves under a reasonableness standard. We do not read it so narrowly. Instead, we believe that it follows from *Robinson* that when the trustees have consistently and literally followed an unambiguous benefit eligibility requirement that was bargained for and that was set forth in an employee benefit plan, that action cannot be called arbitrary and capricious by a court unless enforcement would violate federal law or policy.

Robinson was applied in this manner in *Short v. United Mine Workers of America 1950 Pension Trust*, 728 F.2d 528 (D.C. Cir. 1984). Trustees of the UMWA 1950 Pension Trust denied a pension to a retired mine worker because he had not obtained the necessary years of credited service, a requirement imposed following his retirement as a result of the industry's collective bargaining agreement of 1978. The district court found for the plaintiff, after evaluating the reasonableness of the trustees' action in enforcing the eligibility requirements. The Court of Appeals reversed, stating:

> Under *Robinson* . . . absent conflict with federal law, we have no authority to invalidate the collectively bargaining [sic] eligibility requirements at issue in this case on the ground of unreasonableness, and we cannot invalidate as arbitrary, capricious, or a breach

> of fiduciary duty the actions of the Trustees in administering the 1950 Pension Trust in accordance with the terms established in the collective bargaining agreement.

Id. at 537.

[2] In this case it is apparent that the district court undertook to examine the reasonableness of the prior approval requirement. Although its decision is couched in terms of the absence of "rational justification" for "the trustees' interpretation," the court was, in effect, striking a particular eligibility requirement as itself unreasonable, since the trustees were applying the express requirement for eligibility that was written into the plan. That was made explicit by the court's statement that, "a claimant must still establish medical necessity in order to recover *without gaining prior approval.*" The district court viewed the requirement of prior approval unreasonable in a case where the surgery was admittedly medically necessary. While there is some logic to the district court's conclusion, after *Robinson* the inquiry into the reasonableness of such a provision is no longer permissible.

Moreover, this is not a case where the trustees have been so inconsistent in their prior interpretation of the provision that their action can be viewed as arbitrary and capricious. The evidence in the record establishes that at least three other such claims were denied for obesity treatment coverage under the benefit plan where there was lack of prior approval. Appellees presented no contrary evidence. The only decision pointed to by the appellees as inconsistent is distinguishable. In that instance, the participant had shown that the surgeon attempted to contact the plan administrator prior to surgery, and the participant had twice contacted the

company and/or its insurance carrier to obtain prior approval. Under those circumstances, the trustees granted authorization for benefits. The trustees' statement that it is the practice of the funds to permit approval prior to payment of benefits or prior to the performance of surgery if the surgery is determined to be medically necessary must be understood in the context of the situation before them there. Since no attempt to obtain prior approval was made in this case, that statement does not assist these plaintiffs. We do not believe this record affords any basis for finding any inconsistency in the trustees' administration of the prior approval requirement.

V.

Conclusion.

For the reasons set forth above we conclude that the district court erred in granting summary judgment for the plaintiffs. The courts are not free to modify the terms of collectively bargained benefit plans nor can the action of trustees taken in enforcing the unambiguous language of the prior approval requirement of such a benefits plan be termed arbitrary or capricious. Plaintiffs have conceded at oral argument that there remains no genuine issue of material fact. Indeed that was the basis for the cross motions for summary judgment. Therefore we will reverse the order of the district court granting summary judgment for the plaintiffs and direct that the district court grant the motion for summary judgment filed by the employer, Helen Mining Company.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DISTRICT 2, UNITED MINE WORKERS OF AMERICA, a labor organization; GEORGE ZAYAK, an individual; and JANET ZAYAC, his wife, Plaintiffs,

vs.

HELEN MINING CO., a Pennsylvania corporation; HARRISON COMBS, JOHN J. O'CONNELL, and PAUL R. DEAN, as trustees of the United Mine Workers of America Health and Retirement Funds, Defendants.

Civil Action No. 84-87

MEMORANDUM OPINION

BLOCH, District J.

Plaintiffs bring this action pursuant to the Labor Management Relations Act (hereinafter referred to as "LMRA"), 29 U.S.C. §185, and the Employee Retirement Income Security Act (hereinafter referred to as "ERISA"), 29 U.S.C. §1132. Plaintiffs are District 2, United Mine Workers of America (hereinafter referred to as "plaintiff union"), George Zayac (hereinafter referred to as "husband-plaintiff"), and Janet Zayac (hereinafter referred to as "wife-plaintiff"). Defendants are the Helen Mining Company (hereinafter referred to as "Helen"), a Pennsylvania corporation which does business that affects interstate commerce, and the trustees of the United Mine Workers of America Health and Retirement Funds (hereinafter referred to as "trustees").

The complaint asserts that husband-plaintiff is employed by defendant Helen and is a member of the United Mine Workers of America. Husband-plaintiff is represented, for collective bargaining purposes, by plaintiff union. Defendant Helen and plaintiff union are members of the National Bituminous Coal Wage Agreement of 1981. That agreement requires all signatories to establish and to maintain an employee benefit plan that provides for health benefits. Defendant Helen has established and maintained such a plan that provides for health care benefits to employees and eligible dependents, including spouses. Included within the coverage of the plan is a provision for treatment of morbid forms of severe obesity (200 percent or more of desirable weight). In July of 1982, wife-plaintiff was admitted to a hospital for surgery to reduce her morbid obesity. Wife-plaintiff's surgery met all medical criteria for medical coverage under the benefit plan, but she did not obtain prior approval from the plan administrator for the treatment and surgery. Plaintiffs aver that neither wife-plaintiff nor her physician was aware of the plan's requirement of prior approval for the surgery and, therefore, did not obtain such prior approval. Defendant trustees denied payment of wife-plaintiff's medical bills on the basis that the plan requires approval of the surgery from the plan administrator. The complaint admits that wife-plaintiff did not obtain prior approval, but asserts that the surgery was medically necessary and should be covered. According to the plaintiffs, the decision not to cover the surgery was arbitrary and capricious, and plaintiffs seek recovery for the cost of the medical bills associated with wife-

plaintiff's treatment and surgery in the amount of $17,612.30.[1]

The Court held a status conference in this case on April 27, 1984. At said conference, the parties informed the Court that the case could be decided on motions for summary judgment. The Court ordered that said motions be filed, and plaintiffs and defendant Helen filed cross-motions for summary judgment (docket entries No. 18 and 21), and defendant trustees filed a motion to dismiss or, in the alternative, for summary judgment (docket entry No. 20). For the reasons set forth below, the Court treats the motion of defendant trustees as a motion to dismiss and grants the same. Moreover, the Court grants plaintiffs' motion as to defendant Helen, but denies the same as to defendant trustees. Finally, the motion of defendant Helen is denied. In order to facilitate orderly discussion of the motions, the Court discusses the motion of defendant trustees in a separate section from the discussion of the cross-motions of plaintiffs and defendant Helen.

I. Defendant Trustees Motion to Dismiss[2]

Defendant trustees' motion seeks dismissal of plaintiffs' claim against them on the basis of Fed. R. Civ. P. 12(b)(6), for failure to state a cause of action upon

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1. Defendants admit, in ¶15 of their respective answers (*see* docket entries No. 9 and 10), that this figure represents the correct amount of medical bills, but deny any liability for the amount of said damages.

2. The Court acknowledges that defendant trustees' motion seeks either dismissal or, in the alternative, summary judgment. The Court finds that it can dispose of the motion on the basis of the pleadings and, therefore, treats the motion as a motion to dismiss.

which relief can be granted. When confronted with such a motion, the Court must construe all allegations in the complaint as true because a motion to dismiss admits the allegations, but asserts that the facts, as alleged, do not establish a cause of action. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 376 (1952). As the United States Supreme Court has stated:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss . . . for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Id. at 236. In a Rule 12(b)(6) motion to dismiss situation, the Court must limit its consideration to the facts alleged in the complaint. *Biesenbach v. Guenther*, 588 F.2d 400, 402 (3d Cir. 1978). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). This law guides the Court in its review of defendant trustees' motion.

Defendant trustees' is based upon their belief that they are entitled to quasi-judicial immunity under the facts of this case. The Court agrees with this position. When the allegations of a complaint are based upon the

conduct of one acting in the capacity of arbitrator, that person is acting in a quasi-judicial capacity and is clothed with immunity against actions brought by either of the parties to the arbitration proceeding. *Kahn v. International Ladies' Garment Union*, 311 F.2d 113, 114-15 (3d Cir. 1962). The arbitrator is clothed with this immunity, which is analogous to judicial immunity, unless he or she acts in the clear absence of jurisdiction. *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1209-10 (6th Cir. 1982); *Larry v. Penn Truck Aids, Inc.*, 94 F.R.D. 708, 724 (E.D. Pa. 1982) (*citing Stump v. Sparkman*, 435 U.S. 349, 357 (1978) and *Raitport v. Provident National Bank*, 451 F. Supp. 522, 527 (E.D. Pa. 1978)). Paragraph 16 of plaintiffs' complaint (docket entry No. 1) merely asserts that the defendant trustees' decision was arbitrary and capricious and does not contain any factual allegations from which it can be inferred that the defendant trustees acted outside of their jurisdiction as arbitrators. In the absence of such allegations, the arbitrators are entitled to immunity. Even taking the allegations of the complaint as true and construing them most favorably to the plaintiffs, the Court finds it necessary, under the applicable law, to dismiss the complaint as to the trustees.

II. Plaintiffs' and Defendant Helen's Cross-Motions for Summary Judgment

Summary judgment may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Third Circuit has clearly stated that summary judgment is warranted only upon a clear showing that no genuine issue of fact exists and that the law clearly favors summary judgment

based on those facts. *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62, 66 (1978). These requirements guide the Court in its review of the cross-motions for summary judgment. As stated, the parties agree that the case can be decided on cross-motions for summary judgment, with each party asserting that they or it is entitled to summary judgment as a matter of law. Moreover, the parties agree on the standard to be applied here. The Third Circuit law governing a district court's review of trustees' decisions and actions is clear. The trustees of a pension plan are accorded broad discretion to act,[3] and the Court's review of the trustees' actions is limited to whether they were arbitrary and capricious. *Adams v. New Jersey Brewery Employees Pension Trust Fund*, 670 F.2d 387, 397-98 (3d Cir. 1982). As the Third Circuit has clearly stated:

> Judicial review of pension trustees' decisions is limited to a determination of whether the trustees' actions were arbitrary and capricious . . . Although this is a limited standard of review it "leads neither to advocation of traditional judicial control of fiduciaries nor to excessive judicial intervention in trust operations, in harmony with federal labor policy."

Rosen v. Hotel and Restaurant Employees, 637 F.2d 592, 596 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981) (citation

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3. The Third Circuit has set forth a partial rationale for the broad discretion given to trustees. In *Adams v. New Jersey Brewery Employees Pension Trust Fund*, 670 F.2d 387, 397-98 (3d Cir. 1982), the Third Circuit reasoned that trustees are bound by the conflicting obligations of observing the financial security of the pension fund and, at the same time, applying the assets of the fund for the benefit of the employees to the greatest extent possible. In the eyes of the Third Circuit, trustees must be given broad discretion in order to balance these conflicting obligations.

omitted) (*quoting Dehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1976)). Plaintiffs acknowledge the Court's limited standard of review, but assert that the court should intervene because the trustees' decision in this case was clearly arbitrary and capricious. Defendant Helen, on the other hand, asserts that it is entitled to summary judgment because the trustees' decision was factually sound and rationally based and, therefore, not arbitrary and capricious. Thus, the issue confronting this Court is whether the decision of the trustees was arbitrary and capricious.

The United States Supreme Court has set forth a test for courts to follow in applying the arbitrary and capricious standard. In *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974), *rehearing denied*, 420 U.S. 956 (1975), the Supreme Court stated as follows:

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the . . . [original decision-making body]."

Id. at 285 (*quoting Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). In other words, review under the arbitrary and capricious standard requires that the challenged decision remain intact unless it is not rationally based, or not warranted under law, or without factual justification. *Bickel v. Long-Term Disability Plan of Western Electrical*, 541 F. Supp. 685, 687 (E.D. Pa.

1982). With the law clearly set forth, the Court must now proceed to develop the facts from the record and to apply the law to those facts.

The benefit plan in question provides coverage for gastric bypass surgery to treat obesity. But, under the express provisions of Article III, ¶A(11)(a)(25), of the benefit plan (complaint, Exhibit B, p. EP-35 (docket entry No. 1)) and the 1981 Question and Answer 81-20 (complaint, Exhibit C (docket entry No. 1)), coverage for gastric bypass surgery is available only if the following three requirements have been met:

1. the beneficiary has a pathological, morbid form of severe obesity (200% or more of desirable weight);

2. other, more conservative therapies have been tried and proved unsuccessful; and

3. prior approval has been obtained from the plan administrator.

On July 8, 1982, wife-plaintiff underwent gastric bypass surgery for morbid obesity. During July of 1982, and on subsequent occasions thereafter, husband and wife plaintiffs and their physicians filed claims for medical costs associated with the surgery. All claims were denied on the basis that husband and wife plaintiffs failed to obtain prior approval for the surgery from the plan administrator. Pursuant to Article XX, §(e)(6), of the National Bituminous Coal Wage Agreement of 1981, to which defendant Helen and plaintiff union are signatories, all disputes arising with regard to an employer benefit plan shall be resolved by the trustees. Complaint, Exhibit A, p. 16 (docket entry No. 1). In September of 1982, plaintiff union filed a request for resolution of dispute with the trustees. By opinion of November 1, 1983, the trustees determined that the employer is not respon-

sible for wife-plaintiff's medical bills. Complaint, Exhibit C (docket entry No. 1). The trustees acknowledged that the first two requirements for coverage had been met; that is, the trustee found that wife-plaintiff was suffering from morbid obesity and that other, more conservative therapies have been tried and proved unsuccessful. Nevertheless, the trustees denied the claims on the basis that husband and wife plaintiffs failed to obtain the plan administrator's approval prior to the surgery. The Court must now determine whether this decision was arbitrary and capricious.

As stated earlier, the Supreme Court's *Bowman* decision mandates that a district court consider whether the trustees' decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment in determining whether the decision was arbitrary and capricious. One Court has delineated the appropriate relevant factors for consideration. The Ninth Circuit has held that "adherence to a consistent patter of interpretation is significant evidence that the trustees have not acted arbitrarily." *Gordon v. IT[illegible]-PMA Benefits Funds*, 616 F.2d 433, 440 (1980) (cited with approval by the Third Circuit in *Rosen)*. Defendant Helen points out that these same trustees have denied similar claims due to lack of prior approval in the past and that this consistency of interpretation militates against any argument of arbitrariness. However, the Court also notes that it must consider whether there is a rational nexus between the purpose behind the prior approval requirement and the decision. *Id.* In a previous decision in a morbid obesity case, the same trustees involved in this case addressed the prior approval requirement as follows:

> *The purpose of the "prior authorization" requirement is to insure that benefits are paid only for surgery that is medically necessary.* It is the practice of the Funds to permit approval prior to payment of benefits or prior to the performance of surgery if the surgery is determined to be medically necessary.

ROD Case No. 138, November 24, 1980, p. 4 (attached to this opinion as an exhibit) (emphasis added). The trustees' opinion in wife-plaintiff's case acknowledges that her surgery was medically necessary by finding that other, more conservative therapies have been tried and proved unsuccessful. *See* complaint, Exhibit C (docket entry No. 1). Nevertheless, the trustees denied the claims on the basis of lack of prior approval. This decision frustrates the purpose of the prior approval rule, as established by the trustees, themselves, in the excerpt from ROD Case No. 138 cited above. Because the trustees' decision in wife-plaintiff's case frustrates, rather than fulfills, the purpose of the prior approval rule, the Court finds said decision to be arbitrary and capricious.[4]

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4. The Court acknowledges that the trustees' interpretation need not be one that the Court would have reached, but rather only one that has rational justification. *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 655 (9th Cir. 1981). Here, in light of the frustration of purpose, the Court finds no rational justification. The Court further acknowledges that some might attempt to construe this decision to mean that a beneficiary can *always* recover without obtaining prior approval. The Court dispels any such construction through this footnote. The essence of this decision is that the trustees should not promote form over substance, especially when the form frustrates the purpose of the substance. Under this decision, a claimant must still establish medical necessity in order to recover without gaining prior approval, thereby protecting the purpose of the prior approval rule as set forth in ROD Case No. 138.

An appropriate order will be issued.

/s/ ALAN N. BLOCH
United States District Judge

Date: October 9, 1984

cc: Counsel of record.

OPINION OF TRUSTEES

In Re

Complainant: Employee

Respondent: Employer

ROD Case No.: *138*, November 24, 1980

Board of Trustees: Harrison Combs, Chairman; John J. O'Connell, Trustee; Paul R. Dean, Trustee.

Pursuant to Article IX of the United Mine Workers of America 1950 Benefit Plan and Trust, and under the authority of an exemption granted by the United States Department of Labor, the Trustees have reviewed the facts and circumstances of this dispute concerning health coverage for gastric bypass surgery and hereby render their opinion on the matter.

Background Facts

The Employee is a mineworker eligible for health benefit coverage under the Employer's Plan. The Employee is 5′ 11″ and, according to the attending surgeon, "his most recent weight (as of April 28, 1980) is in the neighborhood of 500 lbs. His desirable weight would be 175 lbs." The Employee underwent gastric bypass surgery on April 17, 1980 as treatment for his morbid obesity.

On April 8, 1980, the Employee contacted the Employer to discuss the upcoming surgery, at which time he was referred to the insurance company administering the Employer's health benefit plan. The Employee was advised by a representative of the insurance company that he must obtain prior approval from the Plan Administrator for the surgery. It was, therefore, necessary for the attending surgeon to furnish the Plan Administrator with a letter stating the employee's medical conditions

which necessitated the surgery. The Employee allegedly obtained and sent such a letter to the insurance company; however, the insurance company denies receipt of the letter. Information from the physician's office indicates that such a letter was sent to the insurance company on April 10, 1980. On April 15, 1980 the Employee again contacted the insurance company and was informed that the physician's letter had not been received. The Employee underwent the surgery on April 17, 1980, as originally scheduled.

Approximately two weeks after surgery, the insurance company was provided with a letter from the physician (dated April 28, 1980) which stated the necessity of the surgery. According to information from the surgeon's office, this was the second letter concerning the Employee which was sent to the insurance company.

The charges associated with the surgery were denied by the insurance company on the grounds that authorization from the Plan Administrator had not been obtained by the Employee prior to the gastric bypass surgery.

Dispute

Is the Employer responsible for the payment of charges incurred by the Employee as a result of gastric bypass surgery?

Position of Parties

Employee's Position: The Employer is responsible for payment of the incurred medical charges. The insurance company was supplied with two letters from the physician stating the medical necessity of the surgery.

Employer's Position: According to Article III, A(3) (f) of the Employer's Plan, benefits are not provided for

certain surgical services, such as gastric bypass surgery for obesity, without the prior approval of the Plan Administrator. This policy is outlined again in the 1978 Contract Question and Answer Number 38. The Employee failed to obtain such prior approval from the Plan Administrator. The physician's report was not received by the insurance company until after the surgery had already been performed. Therefore, the Employee did not comply with the provisions of the Plan, and, accordingly, was not entitled to medical benefits for such surgery.

PERTINENT PROVISIONS

- Article III, Section A(3) (f) of the Employer's Plan states the following:

  Benefits are not provided for certain surgical services without prior approval of the Plan Administrator. Such surgical procedures include, but are not limited to, the following:

  - Plastic surgery, including mammoplasty
  - Reduction mammoplasty
  - Intestinal bypass for obesity
  - Gastric bypass for obesity
  - Cerebellar implants
  - Dorsal stimulator implants
  - Prosthesis for cleft palate if not covered by crippled children services
  - Organ transplants

- 1978 Contract Question and Answer No. 38, approved by the Trustees on June 27, 1979 states the following:

  Subject: Obesity

  Question:

1. a) Under Article III, Section A(3) (h) the benefits are limited to services "for treatment of illnesses or injuries, if provided by a physician". In this context, is the treatment of obesity, where no other pathology exists (e.g., hypertension, cardiovascular disease, diabetes), a covered benefit?

   b) Under what conditions are benefits provided for the surgical treatment of obesity?

Answer:

1. a) Yes, if the diagnosis signifies pathological, morbid form of severe obesity, i.e., 200% or more of the desirable weight. Beneficiaries eligible for obesity benefits at the onset of treatment are eligible for such benefits until they reach their desirable weight.

   b) Benefits are not provided for surgical treatment of obesity unless all of the followig conditions are met:

      1) The beneficiary's condition meets the above definition of obesity;

      2) other, more conservative therapies have been tried and proven unsuccessful; and

      3) authorization has been obtained from the Plan Administrator.

DISCUSSION

Contract Q & A 38 lists three requirements that a beneficiary must meet in order to receive benefits for surgical treatment of obesity: (1) the Employee's diagnosis must signify a pathological form of obesity, (2) more conservative therapies must have been tried and proven unsuccessful, and (3) authorization must have been ob-

tained from the Plan Administrator. Information supplied by the miner's physician indicates the Employee meets the first two requirements. The only question is whether the Employee meets the third requirement of authorization from the Plan Administrator.

The purpose of the "prior authorization" requirement is to insure that benefits are paid only for surgery that is medically necessary. It is the practice of the Funds to permit approval prior to payment of benefits or prior to the performance of surgery if the surgery is determined to be medically necessary.

In the instant case, the Employer's Plan does not specify what steps an Employee should follow to obtain prior authorization for this surgical procedure. The Employee contacted the Plan Administration eight days prior to surgery and, according to the records of the Employee's doctor, sent the required information to the Plan Administration prior to surgery. When he did not receive a response, the Employee again contacted the Plan Administrator two days before surgery. After he was informed that the doctor's letter had not been received, the Employee had another letter sent soon after surgery.

Since the Employee's doctor attempted to inform the Plan Administrator prior to surgery and the surgery was medically necessary, authorization for benefits should be granted.

OPINION OF THE TRUSTEES

Based on the facts stated above, the Trustees are of the opinion that the Employer is responsible for payment of charges incurred by the Employee as a result of gastric bypass surgery in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DISTRICT 2, UNITED MINE WORKERS OF AMERICA, a labor organization; GEORGE ZAYAK, an individual; and JANET ZAYAC, his wife, Plaintiffs,

vs.

HELEN MINING CO., a Pennsylvania corporation; HARRISON COMBS, JOHN J. O'CONNELL, and PAUL R. DEAN, as trustees of the United Mine Workers of America Health and Retirement Funds, Defendants.

Civil Action No. 84-87

JUDGMENT ORDER

AND NOW, this 9th day of October, 1984, upon consideration of Defendant Trustees' Motion to Dismiss filed in the above captioned matter on May 29, 1984, IT IS HEREBY ORDERED that said Motion is GRANTED and plaintiffs' complaint against defendant trustees is hereby dismissed.

AND, upon further consideration of Plaintiffs' Motion for Summary Judgment filed in the above captioned matter on April 27, 1984, IT IS HEREBY ORDERED that said Motion is GRANTED against defendant Helen Mining Company only, and judgment is hereby entered in favor of plaintiffs and against defendant Helen Mining Company in the amount of $17,612.30.

AND, upon further consideration of Defendant Helen Mining Company's Motion for Summary Judgment filed in the above captioned matter on May 29, 1984, IT IS HEREBY ORDERED that said Motion is DENIED.

/s/ ALAN N. BLOCH
United States District Judge

cc: Melvin P. Stein, Esquire
1512 Frick Building, Pittsburgh, PA 15219.

Anthony J. Polito, Esquire
Suite 210, Two Chatham Center, Pittsburgh, PA 15219.

Marshall J. Conn, Esquire
3400 Grant Building, Pittsburgh, PA 15219.

William F. Hanrahan and Catherine H. Mitchell, Esquires
2021 K Street, N.W., Washington, DC 20006.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3723

DISTRICT 2, UNITED MINE WORKERS OF AMERICA, a labor organization; GEORGE ZAYAC, an individual and JANET ZAYAC, his wife

vs.

HELEN MINING CO. a Pennsylvania corporation; HARRISON COMBS, JOHN J. O'CONNELL and PAUL R. DEAN, as trustees of the UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS
The Helen Mining Company, Appellant

(D. C. Divil No. 84-0087)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: HUNTER and SLOVITER, Circuit Judges and MUIR, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel May 17, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

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*Honorable Malcolm Muir, United States District Court for the Middle District of Pennsylvania, sitting by designation.

District Court entered October 9, 1984, be, and the same is hereby reversed and the cause remanded to the said District Court with direction that the summary judgment motion filed by the employer, Helen Mining Company, be granted. Costs taxed against appellees. All the above in accordance with the opinion of this Court.

ATTEST:
/s/ SALLY MRVOS
Clerk

May 31, 1985

Certified as a true copy and issued in lieu of a formal mandate on July 15, 1985.

Costs taxed in favor of Appellant as follows:

Docketing Fee	$ 65.00
Appendix	149.84
Brief	35.00
Reply Brief	27.00
TOTAL	$276.84

Test:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX D
No. 84-3723

DISTRICT 2, UNITED MINE WORKERS OF AMERICA,
GEORGE ZAYAC and JANET ZAYAC
v.
THE HELEN MINING COMPANY, *Appellant*

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, Circuit Judges, and MUIR, District Judge*

The petition for rehearing filed by Appellees, DISTRICT 2, UNITED MINE WORKERS OF AMERICA, GEORGE ZAYAC and JANET ZAYAC in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ DELORES K. SLOVITER
Judge

Dated: July 5, 1985

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*Hon. Malcolm Muir, United States District Court for the Middle District of Pennsylvania, sitting by designation.

APPENDIX E

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DISTRICT 2, UNITED MINE WORKERS OF AMERICA, a labor organization; GEORGE ZAYAC, an individual; and JANET ZAYAC, his wife, Plaintiffs,

vs.

HELEN MINING CO., a Pennsylvania corporation; HARRISON COMBS, JOHN J. O'CONNELL, and PAUL R. DEAN, as trustees of the United Mine Workers of America Health and Retirement Funds, Defendants.

Civil Action
No. 84-87

JUDGMENT ORDER

AND NOW, this 3rd day of June, 1985, in accordance with the opinion of the Third Circuit Court of Appeals' dated May 31, 1985,

IT IS HEREBY ORDERED that Defendant Helen Mining Company's Motion for Summary Judgment filed in the above captioned matter on May 29, 1984, is GRANTED.

/s/ ALAN N. BLOCH
United States District Judge

cc: Melvin P. Stein, Esquire
1512 Frick Building, Pittsburgh, PA 15219.

Anthony J. Polito, Esquire
Suite 210, Two Chatham Center, Pittsburgh, PA 15219.

Marshall J. Conn, Esquire
3400 Grant Building, Pittsburgh, PA 15219.

William F. Hanrahan, et al., Esquires
2021 K Street, N.W., Washington, DC 20006.

APPENDIX F

§ 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by wit of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, § 1, 62 Stat. 928.)

APPENDIX G

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits By And Against Labor Organizatons

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent—Entity for purposes of suit—Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintians its principal office, or (2) in any district in which its duly

authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

APPENDIX H

§ 186. RESTRICTIONS OF PAYMENTS TO EMPLOYEE REPRESENTATIVES

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, and of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept,

any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 USCS §§ 301-327]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in

the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, that the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within

a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, that no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representa-

tive for the purpose of defrayng the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceedings directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended [29 USCS §§ 151-158, 159-168], or this Act [29 USCS §§ 141-144, 151-158, 159-167, 171-183, 185-187, 557]; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 USCS §§ 153, 158, 159, 160, 164, 186, 187, 401-402, 411-415, 431-441, 461-466, 481-483, 501-504, 521-531].

APPENDIX I

§ 1132. CIVIL ENFORCEMENT

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or

(B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions. (1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 [26 USCS §§ 401(a), 403(a), or 405(a)] (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect [respect] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USCS §§ 1051 et seq., §§ 1081 et seq.] (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USCS § 1145].

(c) Administrator's refusal to supply requested information. Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the

court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity. (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may

be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.